FILED
JUL 13 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 245

M. A. TILBURY,
DOING BUSINESS AS
TILBURY'S SOUTHERN MEAT COMPANY,
Petitioner

versus

WILLIAM J. ROGERS, REGIONAL DIRECTOR OF THE WAGE, HOUR AND PUBLIC CONTRACTS DIVISION, UNITED STATES DEPARTMENT OF LABOR, ET ALS.,
Defendants

And

M. A. TILBURY, doing business as
TILBURY'S SOUTHERN MEAT COMPANY
Petitioner

versus

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR
Defendant

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

ROBERT G. CHANDLER
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LECOMTE, SHREVEPORT, LOUISIANA

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Defendant

TO THE HONORABLE
THE SUPREME COURT OF THE UNITED STATES

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 220 Fed. 2d 757 (Advance Sheets, May 23, 1955), and

the opinion of the United States District Court for the Western District of Louisiana is reported in 123 Fed. Supp. 109. Copies therof appear in the printed Record at pages 80-89 Inc. and at pages 114.

GROUNDS FOR INVOKING JURISDICTION

The grounds for invoking the jurisdiction of this Court are, that the decision of the United States Court of Appeals in this case is apparently in conflict with the decision rendered by the Court of Appeals for the Sixth Circuit in *Hunter vs. Madison Avenue Corp.*, 174 Fed. 2d 164, in which case an application for a writ of certiorari was denied by this Court.

The jurisdiction of this Court is futher invoked on the ground that this case presents a situation where work and labor performed upon goods entering Interstate Commerce had no beneficial effect in preparing said goods or readying them for commerce, this being a case of first impression on this point.

The decision of the United States Court of Appeals sought to be reveiwed was rendered on April 21, 1955 (Record page 114). A rehearing was timely applied for and the Court of Appeals made its action final by denying such application on May 10, 1955 (Record page 119).

That paragraph 1 of Section 1254 of title 28 of the U.S.C.A. confers jurisdiction on your Honors in this case.

QUESTIONS PRESENTED

There are two questions presented in this case, First, whether the Fair Labor Standards Act is applicable where the work and labor on goods ultimately entering the stream of commerce had no beneficial effect in readying said goods for commerce, and, Second, whether the Fair Labor Standards Act applies where the employer's business is fundamentally intrastate in character; there are several intervening steps between the employee's work and the entrance of the goods into commerce; and only an inconsequential incident of Interstate Commerce has occurred.

STATUTES INVOLVED IN THE DISPOSITION OF THIS CASE

The disposition of this case involves the proper interpretation of the Fair Labor Standards Act, Title 29 Sections 201-219 inc. U.S.C.A. The pertinent provisions of the Act are set forth in an Appendix to this petition.

STATEMENT OF THE CASE

The present petitioner M. A. Tilbury, was advised by a representative of the Department of Labor that he owed some thousands of dollars in overtime wages to certain of his employees under the provisions of the Fair Labor Standards Act. He thereupon instituted a suit for a declaratory judgment seeking to ascertain whether his business was governed by the Act. (Record page 1)

Two of petitioner's former employees entered a counterclaim against him in that suit, (Record page 15) which, on motion of the Government was dismissed insofar as the Department of Labor was concerned. (Record page 22) In the meantime the Government instituted two suits against present petitioner, one seeking to recover wages for the use and benefit of certain employees (Record page 31) and the other to enjoin the defendant from violating the Act. This latter suit was dismissed and is not involved here. (Record page 88) These suits were consolidated for trial, resulting in a judgment in favor of the counterclaimants and in favor of the Government.

The facts are practically undisputed and so far as they bear upon the present petition they are as follows:

A

That the defendant is a wholesaler selling fabricated meat cuts, all of his sales of meat being within the State of Louisiana. (Record page 26)

B

That bones and inedible meats constitute .216 of one percent of petitioner's total dollar sales and 8 4/5 of his total tonnage. (Record page 57)

C

That the bones and inedible meats were sold locally to certain rendering plants which converted the products into meat scraps, cracklings, tankage and tallow, parts thereof being sold and delivered in Interstate Commerce. (Record pages 54 and 55)

REASONS FOR GRANTING THE WRIT

It cannot be denied and this petitioner does not deny, that where work and labor is performed upon goods beneficially preparing them for their entrance into the stream of commerce, that the persons performing the work are entitled to the benefits of the Act. But this petitioner does contend that where the work and labor, even if it be admitted that it was performed upon goods entering commerce, has no beneficial effect upon the goods and does not assist in preparing them for their final use, that the Act does not apply. There are scores of cases holding that the production of goods for commerce brings the employee within the orbit of the Act, but so far as we know there is no adjudicated case holding that where the work and labor was not necessary and helpful that the Act applies. In this case the employee's work consisted entirely of boning meat and preparing fabricated meat cuts. No work whatever was performed on the bones as such. The bones and inedible meat merely constituted refuse or garbage which was sold for an insignificant sum. The rendering plants acquiring this residue worked upon it, producing tankage and tallow. The articles so resulting would have been better for their ultimate purpose if the meat had been left upon the bones, and it is for that reason that this petitioner contends that the boning of the meat did nothing towards improving or readying the commodity for its ultimate use. On the contrary we suggest that the commodity in the absence of the employee's work would have been more valuable for the use to which it was ultimately put.

This petitioner also contends that this case is controlled by the principle enunciated in *Hunter vs. Madison Ave. Corp.*, (Sixth Circuit) 174 Fed. 2d 164. In that case the Court held that the labor which it was contended brought the employees within the purview of the Act was too many steps removed from the final entrance of the commodity into Interstate Commerce. The Court also held that when some inconsequential incident of Interstate Commerce resulted from the conduct of a fundamentally intrastate business, that the rule de minimis was applicable.

In this case, ninety nine and four fifths percent of petitioners dollar volume was derived from intrastate sales. Your Honors said in *Walling vs. Jacksonville Paper Co.*, 317 U.S. 564, that the intention of Congress was to leave local businesses to regulation by the states. It is clear that this is a fundamentally intrastate business and if a line is to be drawn this business is clearly one beyond the scope of the Act.

It is true that your Honors held in *Mabee vs. White Plains Publishing Co.*, 327 U.S. 178,that the rule de minimis did not apply there. We suggest however, that this case is distinguishable from the *Mabee* case because your Honors refused an application for a writ of certiorari in *Hunter vs. Madison Ave. Corp.* supra. We suggest that one distinction to be drawn between the *Mabee* decision and the case at the bar is that the employee's work in the cited case was beneficial and necessary to the confection of the commodity which entered Interstate Commerce. The newspapers produced by the publishing company could

not have come into being in the absence of the work done by the employees. In this case tankage, cracklings etc. would have resulted even if petitioner's employees had not deboned the meat.

CONCLUSION

In view of the fact that this is a case of first impression on one point and the decisions of two of the Courts of Appeals are in apparent conflict on the second point, we submit that the writ of certiorari herein sought, should be ordered to issue.

M. A. TILBURY

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APPENDIX A

Title 29, Sec. 203, U. S. C. A.

(j) "Produced" means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any closely related process or occupation directly essential to the production thereof, in any State.

Title 29, Sec. 206, U. S. C. A.

(a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates:

(1) during the first year from the effective date of this section, not less than 75 cents an hour,

Title 29, Sec. 207, U. S. C. A.

(a) Except as otherwise provided in this section, no employer who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

APPENDIX "B"

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 15,409

M. A. TILBURY, doing business as
TILBURY'S SOUTHERN MEAT COMPANY
Appellant,

versus

JAMES P. MITCHELL, Secretary of Labor,
United States Department of Labor, ET AL.,
Appellees.

Appeal from the United States District Court for the Western District of Louisiana.

(April 21, 1955.)

Before HUTCHESON, Chief Judge, and HOLMES, Circuit Judge.

PER CURIAM:

For the reasons stated by Judge Dawkins, Jr., in his opinion in these cases, and upon the authorities therein cited, the judgments appealed from are affirmed. These cases were by consent consolidated for trial in the court below with separate judgments to be entered in each case, which was done. The opinion of Judge Dawkins is reported in 123 Fed. Supp., pages 109-115.

Affirmed.